18/24

Office - Supreme Court, U.S.
FILED
NOV 8 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 115

J. S. GARLINGTON by Donald Garlington as next friend, the said J. S. Garlington in his own behalf individually, and Donald Garlington individually as sole heir at law of Jennie Lou Garlington, deceased wife of said J. S. Garlington,

Appellants,

vs.

A. L. WASSON and wife MARTHA WASSON and N. H. REED,

Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS, ELEVENTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, EASTLAND, TEXAS

Petition for Rehearing

(Application for Consideration of the Papers whereon Appeal was taken as a Petition for Certiorari)

ELMER McCLAIN
Lima, Ohio
Counsel for Petitioners-Appellants

T. B. COFFIELD
Bowie, Texas
PAUL DONALD
J. M. DONALD
Bowie, Texas
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 38, ILL. LA SEVIER 2-2361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 115

J. S. GARLINGTON by Donald Garlington as next friend, the said J. S. Garlington in his own behalf individually, and Donald Garlington individually as sole heir at law of Jennie Lou Garlington, deceased wife of said J. S. Garlington,

Appellants,

vs.

A. L. WASSON and wife MARTHA WASSON and N. H. REED,

Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS, ELEVENTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, EASTLAND, TEXAS

Petition for Rehearing

(Application for Consideration of the Papers whereon Appeal was taken as a Petition for Certiorari)

On October 8, 1956 the appeal in this case was dismissed "for want of jurisdiction".

A federal question was properly raised repeatedly in each of the three state courts below and necessarily passed upon by those courts. The Jurisdictional Statement explicitly asserted, sustained by the Record, that "the appellants clearly and repeatedly specially set up and claimed under the Constitution and statutes of the United States their title and right to their farm and their privilege and immunity from foreclosure". The Jurisdictional Statement, page 20, paragraph VI. Tr. 52, paragraph VI; Tr. 53, paragraph VIII; Tr. 100, paragraphs II and III; Tr. 20, paragraph IV; Tr. 104-110; Tr. 42-45.

Yet this Court did not treat the appeal papers as a petition for a writ of certiorari as required by 28 U. S. C. Sec. 2103 and as was suggested in the Jurisdictional Statement. Page 2, second paragraph; page 3, second paragraph; page 4, second full paragraph; page 6, third paragraph.

Counsel for the appellants is not informed as to the precise reason why this Court determined that it had no jurisdiction over the appeal. However he surmises that the Court felt that there had not been a sufficiently "explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assoc.* v. *Alderson,* 324 U.S. 182, 185. In the state courts appellants grounded their attacks on the state proceedings more in terms of the supremacy or preemption of the federal bankruptcy statute (Sec. 75 of the Bankruptcy Act; 11 U.S.C. Sec. 203)—as adjudicated by this Court in *Kalb* v. *Feuerstein,* 308 U.S. 433—than in terms of the constitutional invalidity of the state statutes under which the state proceedings were invoked. And while the federal question was properly raised in every pleading and brief in each of the state courts below, no decision

below explicitly referred to any contention or made any ruling as to the constitutional validity of any state statute. Under such circumstances, this Court might properly conclude that it had no jurisdiction to consider the case on appeal.

But inasmuch as the appellants did consistently and properly raise a federal question as to the supremacy or preemption of the federal bankruptcy statute, thereby defeating the application of state law, it is submitted that it is incumbent upon this Court to treat the Jurisdictional Statement as a petition for a writ of certiorari. As stated in *Charleston Federal Savings & Loan Assoc.* v. *Alderson,* (*supra*) 324 U.S. 182 at 187, the Court was "required" to so treat the appeal papers by virtue of 28 U. S. C. Sec. 2103. See also *Wilson* v. *Cook,* 327 U. S. 474, 482. The mere fact that the state courts below did not expressly pass upon this federal issue, but "plowed around it", does not defeat the existence of that question nor justify a failure to exercise this Court's jurisdiction under 28 U. S. C. Sec. 2103. The decisions below necessarily rejected the federal claim urged by the appellants in each of their pleadings and briefs. That claim covered the whole case and was of such a nature that the rights of the parties could not finally be determined without deciding that issue. Only by rejecting the supremacy of the federal bankruptcy statute could the courts below proceed to render judgment to the appellees under state law. Hence the judgments, by their necessary operation, denied appellants' federal claims. And this Court has jurisdiction to enquire by writ of certiorari as to the validity of those claims under such circumstances. *West Chicago St. R. Co.* v. *Illinois ex rel, Chicago,* 201 U. S. 506, 519-520. The federal claim having been distinctly set up and being broad enough to cover the entire case, "it may not be ignored, and this Court cannot refuse to determine whether the alleged fed-

eral right exists and is protected by the Constitution of the United States." *Chicago, B. & Q. R. Co.* v. *Illinois ex rel Com'rs,* 200 U.S. 561, 581.

For the reasons more fully set forth in the Jurisdictional Statement, it is respectfully submitted that the federal issue raised and necessarily rejected below is of sufficient substance and importance to warrant further review in this Court by way of certiorari. In *Kalb* v. *Feuerstein,* 308 U. S. 433, this Court emphatically declared no less than sixteen times in its unanimous opinion that all state statutes and proceedings are absolutely void, devoid of all power, when a farmer has on file a petition under Section 75 of the Bankruptcy Act; 11 U. S. C. Sec. 203. All matters relating to that petition thereafter become subject to the exclusive jurisdiction of the federal bankruptcy court. To countenance the foreclosure in the state courts below while the exclusive federal jurisdiction existed invites chaos and makes a mockery of the fundamental principle that the United States Constitution and the laws enacted in pursuance thereof are the supreme law of the land, binding on all courts and individuals. See also *Commonwealth of Pennsylvania* v. *Nelson,* 350 U. S. 497.

It is requested therefore that this petition for rehearing be granted and that this Court consider the Jurisdictional Statement as a petition for a writ of certiorari under 28 U. S. C. Sec. 2103. On that basis a writ of certiorari should issue to determine the important federal question raised and necessarily rejected by the courts below.

Respectfully submitted,

ELMER MCCLAIN
Counsel for Petitioners-Appellants

T. B. COFFIELD
Bowie, Texas
PAUL DONALD
J. M. DONALD
Bowie, Texas

Certificate of Counsel.

I certify that the foregoing application for the consideration of the appeal papers as a petition for a writ of certiorari is submitted on good faith, not for delay, upon the ground that the appeal papers were not considered as a petition for certiorari pursuant to 28 U. S. C. Sec. 2103 and is filed within the time extended by an Associate Justice of this Court.

ELMER MCCLAIN

Counsel for the
Petitioners-Appellants